NO. 21945

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED DOUGLAS DAVIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California denying the appellant's motion pursuant to Title 28, United States Code, Section 2255 to vacate the criminal judgment against him. (C.T. 21).

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255.

The jurisdiction of this court is based on Title 28, United States Code, Sections 1291, 1294 and 2255.

II

PRELIMINARY STATEMENT

Appellant was charged in a three count indictment with violations of Title 21, United States Code, Section 174, and Title 18, United States Code, Section 1407. On April 28, 1965, after a trial by jury in the United States District Court, for the then Southern District of California, Southern Division, appellant was convicted on two of the three counts in the indictment.

Following his conviction, appellant was sentenced to twenty years and fined the sum of $20,000 on Count II of the indictment and three years on Count III of the indictment. The sentences were to commence and run concurrently resulting in a total imprisonment of twenty years and a total fine of $20,000.

III

STATEMENT OF THE CASE

On January 24, 1966, pursuant to Title 28, United States Code, Section 2255, appellant petitioned the sentencing court to vacate and set aside the judgment of conviction against him. (C.T. 2-8).[1/]

Conrad Walker, attorney, was appointed to represent petitioner in the hearing which petitioner attended. (C.T. 10).

On August 12, 1966, United States District Judge James M. Carter filed a memorandum to counsel in which the petition was denied. (C.T. 16-17). On February 3, 1967 Findings of Fact and Conclusions of Law were filed as was an Order denying the petitioner's motion. (C.T. 18-21).

1/ "C.T." refers to Clerk's Transcript.

On March 6, 1967, petitioner filed a Notice of Appeal. (C.T. 25).

STATEMENT OF THE FACTS

Petitioner retained Murray Goodrich, attorney, to represent him for purposes of bail reduction, (R.T. 9, 41)[2/] and discussed the matter with petitioner thoroughly. (R.T. 41).

After petitioner was released on bond, he retained Goodrich but never paid him. Goodrich was relieved as retained counsel, and then appointed by the Court. (R.T. 44).

Attorney Goodrich talked to petitioner's wife in petitioner's presence and on several other occasions and both agreed she could be of no help. (R.T. 42, 43). Goodrich talked to petitioner's mother, who said she could be of no help to her son. (R.T. 42).

Petitioner admitted on cross-examination that he had discussed the case with Mr. Goodrich on several occasions and that he never asked that his mother or wife be called as witnesses. (R.T. 28-29).

Goodrich, an experienced criminal and civil trial attorney, (R.T. 47-48) felt it would have an adverse effect to call the wife as a witness. (R.T. 42).

He also felt the petitioner should not testify as a matter of trial strategy, because of his prior felony conviction, and because he couldn't satisfactorily explain his presence at the airport. Petitioner agreed he should not testify. (R.T. 39). Petitioner didn't tell Mr. Goodrich he wanted to testify and admitted his prior felony conviction. (R.T. 18, 19).

[2/] "R.T." refers to Reporters Transcript

Petitioner complimented Goodrich on doing a good job. Goodrich advised petitioner before the jury returned to appeal if he lost. Then after the case was over he told him again he could appeal. He never asked Goodrich to appeal. (R.T. 58, 65).

Petitioner admits they discussed an Appeal. (R.T. 64).

IV

ERROR SPECIFIED

Appellant has specified four points on appeal:

"1. The District Court erred in denying appellant's motion to vacate and set aside sentence where the record clearly reflects the deprivation of assistance of counsel at a crucial stage in the criminal proceedings.

1(a) The District Court erred in denying appellant's motion to vacate and set aside sentence where the record fails to show an intentional waiver of his right to appeal.

2. The District Court erred in denying appellant's motion to vacate and set aside sentence where the record and files clearly reflected the deprivation of a fundamental and basic constitutional right.

2(a) An accused in a criminal prosecution has the constitutional right to present his own witnesses to establish a defense and it is plain that this constitutional guarantee may not be waived by or through trial strategy of court appointed trial counsel without the accused's specific assent."

V

ARGUMENT

A. APPELLANT PETITIONER WAS NOT DEPRIVED OF COUNSEL.

Judge Carter found that attorney Goodrich advised petitioner of his right to appeal and that petitioner knowingly waived that right. (C.T. 17, 18). The record sustains such a finding. Judge Carter further believes Goodrich and not the petitioner. (C.T. 19).

See Layne v. United States, 266 F.Supp. 656 (ED Tenn.S.D. 1957)

Judge Carter had known Goodrich in New York and in San D ego. (R.T. 36). Petitioner was impeached by his prior felony conviction. (R.T. 37).

Judge Carter found that the petitioner had counsel of his choice before, during, and after the trial. (C.T. 16, 18).

In this case Mr. Goodrich told appellant of his right to appeal on more than one occasion, (R.T. 57, 58) and said "appeal anything if you lose it." After the conviction attorney Goodrich said "well you can still appeal the case. (R.T. 58)" "I simply told him you can appeal the thing, and right away." (R.T. 65). Appellant admits discussing an appeal. (R.T. 64).

A bare allegation such as that (deception practiced by counsel) does not open the prison gates.

Desmond v. United States, 333 F.2d 378 (1st Cir. 1964)

The facts show petitioner was not "misled" by counsel as was found in Doyle v. United States, 366 F.2d 394 (9th Cir. 1962) relied on by

petitioner. Goodrich told petitioner "I wouldn't handle an appeal. (R.T. 64).

An additional fact indicating a waiver of his right to appeal is evidenced by the late lodging of the instant petition on January 24, 1966, several months after his conviction and sentence on April 28, 1965. (C.T. 2, 8). During the interim period retained counsel made a written motion for reduction of sentence on June 16, 1965. Such delay alone is sufficient to sustain the Court's denial of the petition.

Layne v. United States, supra;

Desmond v. United States, supra.

In Desmond at 381 it was said, "It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney."

Under this section, there must be a showing of plain reversible error by the petitioner.

Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958)

Dodd v. United States, 321 F.2d 240 (9th Cir. 1963)

Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), cert. denied, 369 U. S. 825

Watkins v. United States, 356 F.2d 472 (9th Cir. 1966)

Judge Carter found to the contrary after a review of the trial record. (C.T. 20).

Relying on Dodd, the Court in Watkins denied relief under Section 2255 even though the attorney failed to appeal the original conviction as he

had been requested to do.

Also see Wilson v. United States, 338 F.2d 54 (9th Cir. 1964) where contrary to instructions, the attorney failed to appeal.

Failure to appeal may not be excused upon a mere showing of neglect of counsel.

Dennis v. United States, 177 F.2d 195 (4th Cir. 1949)

The same was true where counsel refused to appeal because the defendant could not pay a fee.

Mitchell v. United States, supra.

B. APPELLANT PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO HAVE WITNESSES IN HIS BEHALF.

Petitioner argues that he was deprived of the right to the testimony of his mother and wife at his trial.

Judge Carter found that petitioner discussed with counsel the possibility of calling petitioner's mother and wife and decided against it as a matter of trial strategy. (C.T. 19).

See McDonald v. United States, 282 F.2d 737 (9th Cir. 1960).

He further found there was no material evidence they could have offered on petitioner's guilt or innocence. (C.T. 19).

The record sustains such a finding.

Attorney Goodrich not only asked the petitioner if his mother and wife, or anyone else, could help, but also asked the wife and mother. (R.T. 41, 42, 52-54). The mother expressly denied knowing anything at all. (R.T.

42). Petitioner and Goodrich agreed the mother's testimony would be useless. (R.T. 43).

Petitioner thought he was going to trial on February 9, 1965, and brought his wife rather than his mother. (R.T. 21). Admittedly his wife could only testify to a conversation with attorney Goodrich. (R.T. 17, 24-25). It appears significant that neither testified at this hearing.

It has been specifically held that impeaching testimony is not sufficient to grant a petition such as this.

Layne v. United States, supra.

Appellant contends that Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) holds that a specific assent is required before a constitutional right may be waived.

In Leser v. United States, 358 F.2d 313 (9th Cir. 1966) it was noted this expression is dicta and the Court found in effect that silence may constitute a waiver.

The relatively recent and much cited case of Dodd v. United States, supra, in an opinion written by the then United States District Judge James M. Carter, (now a Judge for the Ninth Circuit Court of Appeals) appears to hold against petitioner as to most points raised by petitioner in this appeal.

Where, as the trial court did in this hearing, a Finding of Fact is made, the finding shall not be overturned unless clearly erroneous.

Federal Rules of Criminal Procedure 52(a)

Arellanes v. United States, 353 F.2d 270, 272 (9th Cir. 1965)

In Arellanes at page 272, the Court said, "The appellant, then,

comes to this Court with the heavy burden of persuading us that the trial Judge's findings were clearly erroneous." (Emphasis supplied). Arellanes involved a 2255 Motion, also.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted the appellant's petition to vacate sentence in the District Court should be denied.

Respectfully submitted,

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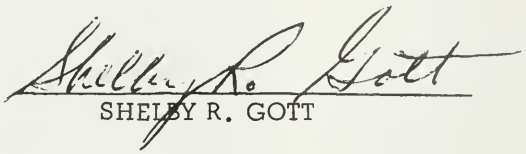
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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